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P 231423Z SEP 09  
FM AMEMBASSY BERLIN  
TO RHEHNSC/NSC WASHINGTON DC PRIORITY  
RUEHC/SECSTATE WASHDC PRIORITY 5279  
INFO RUCNMEM/EU MEMBER STATES COLLECTIVE PRIORITY  
RUCNFRG/FRG COLLECTIVE PRIORITY

C O N F I D E N T I A L SECTION 01 OF 02 BERLIN 001179

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E.O. 12958: DECL: 09/22/2019  
TAGS: [PGOV](#) [KDEM](#) [GM](#)  
SUBJECT: GERMAN ELECTORAL QUIRKS COULD BENEFIT MERKEL'S CDU  
-- THE FIVE PERCENT THRESHOLD AND UEBERHANGSMANDATEN

REF: BERLIN 001133

Classified By: Political Minister Counselor George Glass for reasons 1.  
4 (b,d).

11. (SBU) Summary: Two quirks in the German electoral system could provide Chancellor Merkel's Christian Democratic Party/Christian Social Union (CDU/CSU) and its preferred partner, the Free Democratic Party (FDP), with a parliamentary majority that it otherwise would not obtain from the raw vote count. Under the German system, votes for parties that fall below the five percent threshold for entry into parliament are not considered when allocating seats, and with about five percent of the vote expected to go to such parties, the percentage needed for parliamentary majority is usually around 47 to 48 percent. Second, an electoral law quirk can produce additional seats (known as "surplus mandates" -- Ueberhangsmandaten), so that the CDU/CSU and FDP may win a parliamentary majority with even less support. These "surplus mandates" are not new to the electoral system but have become more significant in recent years, and both in 1994 and 1998 they helped to pump up the parliamentary majorities of the winning coalition. Qs year, some electoral experts are saying that the number of such seats could be even larger than usual and could put the CDU/CSU and FDP over the top. Although the legality of the system is not in question, the Social Democratic Party (SPD), Greens, and the Left Party are all warning the CDU/CSU and FDP against building a government based on surplus mandates. End Summary.

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This Year's Vote  
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12. (U) With both major parties well below 40-percent mark but the CSU/CSU still clearly ahead of the SPD, the Christian Democrats may be in line to receive a record number of "surplus mandates." Some experts have estimated that they could give the CDU/CSU and FDP a parliamentary majority with less than 45 percent of the second ballot vote. The "wasted vote" or the percentage of the second ballot that goes to parties that fall below the 5-percent hurdle actually has a bigger overall impact on lowering the percentage of second-ballot votes needed for a parliamentary majority, but that aspect of the electoral system is less controversial because it helps all the parties that gain representation to the Bundestag.

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How the German System Works  
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13. (U) Germans will cast two votes on election day September 27: the first ballot is for a candidate in their constituency where the winner is chosen by a simple plurality and the second ballot for a state party list that allocates seats based on proportional representation. In each state, half of

the members of parliament are chosen via the first ballot and half come from the party lists, but with the overall number of seats based on the second ballot. Parties must win five percent of the national vote or three direct mandates to be included in the further allocation of seats.

14. (U) The quirk in the system arises because voters can cast their two ballots for different parties, and in fact, supporters of the smaller parties often give their first-ballot vote to a CDU/CSU or SPD candidate with a better chance of winning a plurality. However, if a party wins more direct mandates than it would "deserve" based on the second ballot, the party keeps those seats and the Bundestag's size is increased until the other parties have the share of the seats warranted by the second vote. For example, in 2005 the CDU won 14 of the 17 direct mandates but only 30 percent of the second vote in Saxony. Based on its second vote, the CDU should have only gotten 10 seats but was accorded four "surplus" mandates. Such seats are more common in the eastern states where overall support for the big parties is lower but where the SPD and CDU still win almost all of the direct mandates. In 1994, the CDU's 12 surplus mandates (versus 4 for the SPD) helped pump up what would have been a 2-seat majority. The number of surplus mandates have varied from 0 to 16 in past parliamentary elections, and electoral experts are estimating anywhere from 10 to 25 such seats this time.

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The Legality of Surplus Mandates Not Really in Question  
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15. (U) The smaller parties, which have no real chance of winning such surplus seats, have challenged the constitutionality of the electoral system in the past and the Left Party is threatening to do so again. However, the Federal Constitutional Court has ruled explicitly that surplus mandates are constitutional, including when they produce a parliamentary majority. The Left Party points -- erroneously -- to a 2008 Constitutional Court ruling calling for a change in the electoral law, but that decision did not question the overall constitutionality of surplus mandates and explicitly gave the Bundestag until 2011 to fix a further quirk in the way seats are allocated overall.

Comment  
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16. (C//NF) Comment: The Constitutional Court has affirmed the legality of surplus mandates, so the current controversy is a political and not a legal one. Merkel clearly has the legal right to carry out her pledge to form a CDU/CSU-FDP coalition even if it rests on a single seat, surplus mandate majority. We should note, however, that in states where parties have surplus seats, members of their parliamentary delegations who resign or die in office are not replaced from the party list as is otherwise the case. The total number of members of parliament changes over the course of a parliamentary term because of this, and a majority based on surplus mandates is in danger of disappearing. Once a chancellor is elected, however, she or he can only be replaced within the term by a constructive vote of no confidence, that is the election of a new chancellor by the absolute majority of members of the parliament. Adenauer was elected by a single vote in the Bundestag in 1949, when both the CDU and SPD each had been granted one surplus mandate, and Merkel's recent whistlestop tour from Rhoendorf to Leipzig was meant to invoke the spirit of Adenauer, including his decision to form a government without the Social Democrats even if only by his own vote. End Comment.

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